

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Petition of Mid-Rivers Telephone
Cooperative, Inc. for order Declaring
It to be an Incumbent Local Exchange
Carrier in Terry, Montana Pursuant
To Section 251(h)(2)

WC Docket No. 02-78

COMMENTS OF THE RURAL INDEPENDENT COMPETITIVE ALLIANCE

The Rural Independent Telecommunications Alliance ("RICA") provides these Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") released November 15, 2004 regarding the February 5, 2002 Petition of Mid-Rivers Telephone Cooperative, Inc. ("Mid-Rivers") for an order pursuant to Section 251(h)(2) of the Communications Act declaring it to be an Incumbent Local Exchange Carrier ("ILEC") in Terry, Montana ("Mid-Rivers Petition").¹ RICA is a national association of approximately 80 rural competitive local exchange carriers ("CLECs"), affiliated with rural ILECs. RICA filed in support of Mid-Rivers in May of 2002 when the Commission first asked for comments on Mid-Rivers' Petition.²

RICA members, provide competitive service in rural areas as essentially facilities based carriers. RICA members initiated competitive service in response to the requests of rural communities long ignored by the large ILECs which historically held exclusive

¹ 69 Fed. Reg. 69573 (Nov. 30, 2004). The NPRM, as did the April 19, 2002 Public Notice characterizes Mid-Rivers' Petition as requesting only an order, however the Petition, reflecting the statute, requested "an order and rule." Mid-Rivers Petition at 1.

² RICA Comments May 6, 2002.

franchises for those communities. RICA reiterates its support for grant of the Mid-Rivers Petition and urges the Commission to act expeditiously in view of the long and unexplained delay to which it has already subjected this request.

I AN EXCHANGE OR SIMILAR AREA IS AN APPROPRIATE UNIT FOR SECTION 251(h)(2) DETERMINATIONS

Mid-Rivers has demonstrated, without contradiction, that it occupies the position in the Terry, Montana exchange comparable to that previously held by the presently *de jure* incumbent, Qwest and has substantially replaced Qwest by winning over 90% of the subscribers in the exchange.³ The Commission's tentative conclusions in this respect are correct.⁴

The NPRM, following the late filed comments of Qwest, asks whether satisfaction of the Section 251(h)(2) criteria should be measured over some significant part of the ILEC's entire service area, perhaps as much as the 14 states in which Qwest operates.⁵ The NPRM further questions whether the Commission's decision as to the appropriate area should be influenced by the consequences to the Universal Service Fund.⁶

When Section 251(h)(2) is considered in light of its plain language, its relation to the other relevant provisions of the 1996 Amendments to the Communications Act, and the nature and structure of the industry as understood by Congress, it is not possible to conclude that the term "area" should be interpreted to mean a significant portion of the service territory of large carriers such as any of the Bell Operating Companies, including

³ Mid-Rivers Petition at 2.
⁴ NPRM at paras. 8,9.
⁵ NPRM at para. 7.
⁶ *Id.*

Qwest. Congress must be taken to have intentionally used the term “area” to provide for the exercise of reasonable discretion, and not to have intended a meaning which would have the probable result that the first two conditions would never be met anywhere. Congress was familiar with, and used, the terms “study area” and “operating entity,” which, in the context of a BOC’s service area, cover much larger areas than an exchange.⁷ Instead, Congress used the more flexible term “area” that can be much smaller than either a study area or an operating entity.

For ILECs and CLECs alike, an exchange is the building block for a study area, consisting of one or more central offices, local distribution facilities, and transport facilities to connect to the PSTN.⁸ Exchanges are generally self sufficient within themselves from a technological perspective. As the Commission is aware from the numerous study area waiver petitions it processes, transfers of properties involving less than a corporate merger are typically done at the exchange level. When a rural CLEC overbuilds a large company’s facilities to offer competitive service, it typically does so one exchange at a time.⁹ For the same reasons, it generally, it would not be practical or appropriate to designate a carrier as the incumbent in an area smaller than an exchange.

⁷ See 47 U.S.C. 153(37).

⁸ See, 47 U.S.C. 153(47) (definition of Telephone Exchange Service.) RICA’s discussion here focuses on wireline carriers. While different areas might be appropriate for a CMRS carrier petition, that factual pattern is not presented by the NPRM and no CMRS carrier is known to have indicated the slightest interest in being classified as an ILEC.

⁹ USAC’s reports to the Commission show only exchanges of rural ILECs in which additional ETCs have been designated, most of which are CMRS carriers.

The size difference between RICA member rural CLECs and BOCs such as Qwest are enormous, whether measured by geography or access lines. Just as the Commission once recognized that when an exchange is sold the study area boundaries must be adjusted or there will be absurd results,¹⁰ so too it would be absurd to expect any time in the next few decades that facilities based CLECs would substantially displace a BOC at the study area or holding company level. The discretion given by Congress to the Commission does not go so far as to adopt an interpretation of a statutory provision that as a practical matter means the provision will not be implemented.

The Universal Service Fund impacts of a Section 251(h)(2) designation are not relevant to the question of what area should be used to measure comparable position and substantial replacement.¹¹ The NPRM suggests that the support might increase to the newly designated ILEC, and that if the present incumbent is reclassified as a CLEC, it could become eligible for support at rural ILEC levels, both of which could result in an increase in the fund.¹²

The context of the question seems to imply that the area over which the extent by which a CLEC has displaced an ILEC is measured should be manipulated in order to ensure that its USF doesn't increase. That approach is inconsistent with the Universal Service goals of the act, because it ignores the fact that the reason subscribers almost all abandoned the ILEC is because the CLEC invested in facilities to provide service that the

¹⁰ *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Notice of Proposed Rulemaking, 5 FCC Rcd 5974, 5975-76 (1990)

¹¹ The Universal Service Support issues are also raised by the NPRM in the context of the public interest test of Section 251(h)(2)(C) at paragraph 11, and are addressed in Part II, below.

¹² NPRM at para. 7. The question of the status of the original ILEC is discussed below, however if it does not convert to CLEC status, there would be no basis for its USF to increase under the present rules.

ILEC would not. When this investment occurs in a high cost area, it is to be expected that this investment should receive universal service support. If the support is excessive, the fault is within the support mechanisms, which are presently being reviewed in multiple proceedings. Congress did not intend for the Commission to decide whether or not a CLEC has supplanted the ILEC in an area depending upon whether or not the universal service support would increase.

II THE PUBLIC INTEREST WOULD BE SERVED BY DESIGNATING MID-RIVERS AS AN ILEC.

The NPRM requests comment of the public interest implications for the competitive provisions of the Act and of potential changes in universal service support and access charges.¹³ In regard to promotion of the competitive provisions of the Act, there are at least three relevant comments. First, were it not for the competitive provisions of the act, especially section 253, the citizens of Terry would not now have access to the advanced communications services which Mid-Rivers provides. Second, as the *de facto* incumbent, Mid-Rivers will not subject to the requirements of Section 251(c) applicable to *de jure* incumbents unless its petition is granted. Grant of the petition thus will make Terry more open to competition.

Third, the factual situation in Terry illustrates the fact that the Commission must consider both the competition policies and the universal service policies in the Act, and also recognize that by legalizing competition, Congress understood that, because of the superiority of its service, one carrier may well attract all or almost all of the potential customers rather than evenly divide the market. The facts are that Terry subscribers are

¹³ NPRM at paras. 10-12.

much better off today because Mid-Rivers chose to compete there, and that grant of the petition will make it easier for some other entity to come in and compete with Mid-Rivers. In the meantime, if Mid-Rivers is regulated as an incumbent for interconnection purposes, it is only proper that it also be treated as a incumbent for access and universal service purposes.

The Commission should reject the suggestion in the NPRM that a rule equivalent to Section 54.305 should be adopted to restrict Mid-Rivers' USF support to that of Qwest. As a matter of principle such a rule could only be justified if the Commission's objective were to ensure that rural communities long neglected by large companies remain communications backwaters. Comments currently before the Commission and the Joint Board in CC Docket No. 96-45 demonstrate at length why Section 54.305 should be eliminated. But even if that rule is maintained, its stated purpose was to prevent large companies from realizing a windfall by selling exchanges to small companies at a price which effectively capitalized the potential USF revenue stream. Since there is no sale involved, there is no benefit to the ILEC. There is a benefit to the subscribers, however, who now receive improved telecommunications services, consistent with the objective of Section 254, that would have otherwise never been available to them.

In this particular case, Mid-Rivers has shown that neither the per-line nor absolute support differences are substantial whether support is calculated on Mid-River's cost or Qwest's High Cost Model Support. This situation is not typical, however, because Montana is one of the only 10 states where BOCs receive high cost support. RICA has continually advocated that the Commission revise its rules to recognize the cost incurred

to serve an area is the relevant factor as to whether subscribers will receive improved service. The state-wide average cost of the incumbent, as determined by a model that is not valid for predicting costs of small rural areas, has to relation whatever to the cost of serving a particular exchange such as Terry, whether the carrier is Mid-Rivers or Qwest or costs compared are embedded or forward looking..

III WHEN A CLEC MEETS THE CRITERIA OF SECTION 251(h)(2) THE ORIGINAL ILEC SHOULD FILE ITS OWN PETITION IF IT WANTS TO CHANGE ITS STATUS

The NPRM asks what the regulatory treatment should be of the ILEC which has been substantially replaced, noting that the Act does not address the question.¹⁴ Nothing in the Act, however, precludes two carriers in the same area from having ILEC status and Congress did not require any further proceedings. In the absence of a request from Qwest that the Commission change its status, the most expeditious course for the Commission to follow is to grant Mid-Rivers petition and not cause further delay on the basis of “what if” questions. If Qwest, or any carrier similarly situated comes before the Commission and asks to be relieved of its ILEC status, it will then be appropriate to determine whether such action would be prohibited by the restrictions on forbearance in Section 10 of the Act.

IV THERE IS NO EVIDENCE THAT THE PETITION REPRESENTS A SIGNIFICANT TREND

The NPRM asks whether the Mid-Rivers Petition is representative of other exchanges with competitive entry and whether it represents a larger trend.¹⁵ While RICA members and other ILEC affiliated rural CLECS may often achieve significant

¹⁴ NPRM at 13-15

¹⁵ NPRM at para. 17.

penetration, much as Mid-Rivers has in Terry, and some of these may eventually file similar petitions, only one other petition is known to be pending now.¹⁶ RICA members are proud of what they have accomplished under difficult economic and regulatory circumstances, but they still collectively represent a very small portion of the total access lines nationwide. There is no reason to believe that many urban wireline CLECs or CMRS carriers will reach the substantially displaced standard in the near future. If such a trend should develop, however, the Commission could build a record to support more substantive rules, if necessary. In the meantime, however, it should proceed to grant Mid-Rivers Petition which has been pending for an unreasonable time.

V CONCLUSION

A fundamental characteristic of today's telecommunications industry is the rapid rate of change in its technology and market structure. By the time the comment cycle on this NPRM is completed in mid January, it will be almost three years since Mid-Rivers filed its Petition requesting a change in its status which involves *a few hundred access lines*. That time will also approach the eighth anniversary of the 1996 Act, during which it has only once before addressed Section 251(h)(2), and that in a situation which did not

¹⁶ Public Notice, *Pleading Cycle Established for Comments on Petition for Order Declaring South Slope Incumbent Local Exchange Carrier in Iowa Exchanges of Oxford, Tiffin and Solon*, WC Doc. No. 04-347, Sep. 3, 2004. This proceeding was not established as an Notice of Proposed Rule Making.

involve changing the status of a CLEC to an ILEC.¹⁷ Like Mid-Rivers, RICA members are miniscule portion of the entire industry, but like the rest of the industry, they are subject to its rapid changes. It is essential that Commission take seriously its obligation to implement the Act.

Respectfully submitted

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¹⁷ *Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*, 13 FCC Rcd 13765 (1998).

CERTIFICATE OF SERVICE

I, Stephen G. Kraskin, certify that the foregoing Comments of the Rural Independent Competitive Alliance, were served electronically on the following on December 30, 2004

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